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The Costs and Benefits of Affordable Housing: A Partial Solution to the Conflict of Competing Goods

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ARTICLES

**The Costs and Benefits of Affordable Housing:
A Partial Solution to the Conflict of Competing Goods**

Michael Diamond*

In this Article, I extend a prior inquiry into the costs borne by society due to the lack of enough decent, affordable housing units. I previously outlined those costs and suggested a combination of public cost savings and public and private benefits that would accrue by providing that housing. I posited that the savings and benefits, in the aggregate, could at least substantially offset the costs and might even exceed them. If that is so, I queried, why has society not produced the needed units? In answering that question, I offered several possible responses: inadequate resources, racism, and public choice opposition.

In this Article, I examine the lack of resources in the context of what I have called “the conflict of competing goods.” This conflict arises when there are a variety of public goods to be obtained but insufficient resources to maximize them all. The questions then are how does society choose among them and how ought it do so? I attempt to answer these questions by reverting to a form of evaluation espoused by economists and certain politicians—Cost-Benefit Analysis (CBA).

While I do not accept CBA as the appropriate model for many types of evaluations, I use it here to support an argument that society should provide more affordable housing units. I attempt to identify the costs of the absence of such housing in relation to the benefits of providing it in an effort to enhance the other arguments—morality, equity, etc.—that underlie my own view of the problem. Thus, if the hypothesis is correct—that affordable housing can, essentially, pay for itself, the conflict of competing goods can be substantially, although not entirely, reduced.

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I. INTRODUCTION

This Article involves a summary of the problem, including the costs, of an inadequate supply of decent, affordable housing. It goes on to describe the Cost-Benefit Analysis (CBA) methodology and to criticize its use in certain situations. Nevertheless, I go on to propose a method for the financing and production of significantly more affordable housing consistent with the application of CBA to the problem. There are in our society several social needs that most people, regardless of political affiliations, would say ought to be filled. Better healthcare, education, and housing, for example, are among them.¹ There are differences of

1. See *Public Opinion Research*, HOUSING TRUST FUND PROJECT, <https://housingtrustfundproject.org/campaigns/making-your-case/messages-that-work/public-opinion-research> (last visited Feb. 9, 2020); *Poll: The Public Overwhelmingly Believes Housing Affordability Should Be a*

opinion about *how* those needs should be filled, but not as much debate about the desirability of their being filled. Much of the debate relates to the priority of needs. When a society has insufficient resources to achieve all the social goods about which there is a strong consensus, the society must make choices about how to prioritize them. I have called this problem “the conflict of competing goods.”² There is a good deal of research and scholarly writing on how society makes these choices, but little on how it *ought* to do so. This Article revisits the conflict of competing goods using the twentieth anniversary of the Supreme Court’s decision in *Olmstead v. L.C. ex rel. Zimring*³ as a catalyst.

Olmstead dealt with the anti-discrimination provisions of the Americans with Disabilities Act (ADA).⁴ The case was brought by two individuals, each of whom had voluntarily admitted themselves to Georgia’s state mental facilities.⁵ Each had subsequently been found by their respective treatment teams to be a good candidate for treatment in then-existing community-based mental health programs.⁶ Each, however, was not placed in such a facility and remained confined in state institutions.⁷ They sued the state of Georgia, claiming a violation of the anti-discrimination provisions contained in Title II of the ADA.

Georgia argued there was inadequate funding to accommodate the plaintiffs’ requests.⁸ The state claimed it was using all available funds to provide services to other disabled persons and, therefore, it was not discriminating against the plaintiffs based on their disabilities.⁹ The lower courts held the lack of funding did not excuse the failure to place the plaintiffs in available community treatment facilities.¹⁰ The Supreme Court agreed with the Ninth Circuit that “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”¹¹ However, the Court also accepted Georgia’s financial defense theory. The Court held, in an opinion by Justice Ginsburg:

[W]e recognize, as well, the States’ need to maintain a range of facilities for the care and treatment of persons with diverse mental disabilities, and the States’ obligation to administer services with an even hand. Accordingly, we further hold that the Court of Appeals’ remand instruction was unduly restrictive. In evaluating

Top National Priority; Expects Congress and President to Take Major Action, Opportunity Starts at Home, <https://www.opportunityhome.org/pollpressrelease> (last visited Feb. 9, 2020).

2. See Michael Diamond, *Affordable Housing and the Conflict of Competing Goods: A Policy Dilemma*, in AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS (Nestor M. Davidson & Robin Paul Molloy eds., 2009).

3. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).

4. 42 U.S.C. § 12132 (1994) (“Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”).

5. *Olmstead*, 527 U.S. at 593.

6. *Id.*

7. *Id.*

8. *Id.* at 594.

9. *Id.*

10. *Id.* at 595.

11. *Id.* at 597.

a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.¹²

The holding, while recognizing the rights of the plaintiffs to be free from the discrimination that existed, moderates those rights based on the financial capacity of the state to comply. Justice Kennedy, in a partially concurring opinion, aptly framed the issue:

No State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities. If, for example, funds for care and treatment of the mentally ill, including the severely mentally ill, are reduced in order to support programs directed to the treatment and care of other disabilities, the decision may be unfortunate. The judgment is, however, a political one.¹³

Olmstead's attempt to fashion a practical response to the questions presented raises two serious theoretical questions. The first implicates the *conflict of competing goods*—in *Olmstead*, the conflict between non-discrimination and mental health services. The second concerns the interrelationship between several social goods in which the improvement in one creates improvements in others—in *Olmstead*, the savings to be derived from moving patients from an institutional setting to a community one. These improvements might result in the government avoiding a variety of public costs and in the creation of social benefits sufficient, in the aggregate, to pay for the improvement. Such an outcome might lessen the quandary of having to choose among competing goods.

If such savings and benefits could be achieved by making a social investment, why are such investments not made? This question relates to the conflict of competing goods in several ways. First, the social investment could result in achieving a valued social good at limited net expenditure of resources. Second, while it may lessen the quandary of prioritization of competing goods, it does not, as I will discuss in Part III, below, eliminate it.

I should say at this point that I am not an expert in disability law or in discrimination under the ADA. In fact, I know only what the reasonably well-read layperson knows about these important issues. My participation in this discussion derives more from my prior explorations of how a society with finite resources ought to prioritize allocation of those resources. In pursuing this question, I have previously examined the net effects of certain kinds of public expenditures to determine why some such investments might not have been made, even where they could result in a counterbalancing set of costs avoided or benefits gained. My goal in this Article is to continue that examination.

12. *Id.*

13. *Id.* at 612 (Kennedy, J., concurring).

Assuming the benefits I allude to are demonstrable, there are several additional issues that need to be addressed. For example, since not all the benefits to be derived from providing additional housing will inure directly to the government, how does the public capture the private benefit? Should the direct governmental savings inure to the agencies that produced the housing? Each of the governmental agencies involved in areas where benefits have accrued might argue that the proceeds from these benefits ought to be allocated to them. They might rightly argue that not all the societal goals in their particular field have been met and there are insufficient total resources available to meet them. The conflict of competing goods, redux.

These are among the questions that can be seen as presented by the *Olmstead* opinion. The Court permits the state's claim of lack of sufficient resources to place the plaintiffs in a community facility to override the plaintiffs' statutory right to such a placement, a right that the Court recognizes in *Olmstead*.¹⁴ This overriding of the plaintiffs' right occurs despite the fact that placing them in community facilities would likely be less costly than continuing their confinement in state facilities.¹⁵ The several opinions in *Olmstead* thus offer the opportunity to re-examine in context the two questions I posed earlier concerning the choice between competing social goods and the method by which the government might recapture and repurpose the benefits derived from making a particular choice.

Part II summarizes the argument that by providing additional affordable housing for the benefit of low-income households there will be significant cost savings to the government along with significant benefits to individual households and to society as a whole. I will also suggest some reasons why, assuming my working hypothesis is correct, society nonetheless fails to provide such housing. Part III discusses the concept of Cost-Benefit Analysis (CBA) and the difficulty of measuring the public benefit derived from certain types of social investments. I will also discuss the ways in which some of the non-governmental benefits can be quantified and monetized, and the fact that many of the resulting benefits cannot, or should not, be monetized. Part III will conclude with a discussion of various critiques of CBAs as applied to social investments. Part IV discusses the investment in additional affordable housing in relation to CBA. I reprise the problem of the conflict of competing goods and discuss how it relates to the allocation decisions discussed in Part III. This includes a discussion of government capture of some of the private benefit derived from additional affordable housing. I conclude with some final thoughts about the relationship of CBAs to affordable housing and to the conflict of competing goods.

II. THE NATURE OF THE PROBLEM

The United States faces a severe shortage of decent housing that is affordable to lower-income residents. For the most vulnerable households, the deficit in

14. *Id.* at 597.

15. *Id.* at 595, 607.

affordable and available housing approximates eight million units.¹⁶ The effects of the housing deficit are well documented in academic literature. Indeed, I have explored the deficit at length in an earlier article.¹⁷ The impact of this deficit falls predominantly on low-income households that often are faced with the choice between living in sub-standard housing units, paying too high a percentage of their income towards housing costs, or doubling up with another household in order to manage the costs.¹⁸ The most extreme result of the deficit is homelessness.

A. The Effects of the Housing Deficit

In addition to these easily observable effects of the housing deficit, there are also secondary effects of the lack of adequate and affordable housing. These latter effects include poorer health outcomes, lower educational achievement, more involvement with the criminal justice system and incarceration, and lower productivity rates. What has been less recognized, at least in the legal literature, has been the cost to society that can be attributed to the affordable housing deficit. The costs of dealing with these effects through the use of Medicaid and Medicare, the courts, police, correctional officers, and prisons, along with the lost educational opportunities and work productivity, are borne by society as a whole.¹⁹

My point is not that the lack of decent affordable housing accounts for all of these losses which, in the aggregate, are very large. There are many causes for poor health, low academic achievement, and loss of productivity, and causality between inadequate housing and these outcomes is difficult to show. Nevertheless, it is clear the lack of decent affordable housing is a major contributor to such problems.²⁰ In the next sections, I will describe the magnitude of the aggregate loss for various effects and suggest a framework to tie the losses to the affordable housing deficit.

1. Homelessness

Perhaps the most recognizable effect of the housing deficit is homelessness. While not everyone who is homeless is so due to the housing deficit, a large percentage of homeless persons can be attributed to the absence of available affordable units.²¹ Moreover, according to the United States Interagency Council on Homelessness, approximately “one-third of all people experiencing

16. ANDREW AURAND ET AL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES 2* (2017), https://nlhc.org/sites/default/files/Gap-Report_2017.pdf (estimating that in 2017, there was a national shortage of 7.4 million affordable and available rental homes for extremely low-income renters alone).

17. See Michael Diamond, *Affordable Housing: Of Inefficiency, Market Distortion, and Government Failure*, 53 U. RICH. L. REV. 979 (2019).

18. AURAND ET AL., *supra* note 16, at 4–5.

19. See Diamond, *supra* note 2, at 994–1005.

20. MEGHAN HENRY ET AL., U.S. DEP’T OF HOUSING & URBAN DEV., OFFICE OF COMMUNITY PLANNING & DEV., *THE 2018 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 10–12* (2018), <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

21. See, e.g., NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES*, https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf (last visited Feb. 16, 2020); *Homelessness in America*, THE NAT’L COALITION FOR THE HOMELESS, <https://nationalhomeless.org/about-homelessness> (last visited Feb. 16, 2020).

homelessness on a given night” are families with children.²² That includes approximately 58,000 households, or 188,000 people total, of whom more than 109,000 are children.²³ The costs of homelessness to the public have been estimated to be upwards of seventeen billion dollars per year.²⁴ This does not include lost opportunities to the public due to disrupted and incomplete educational attainment (and the long-term effects of those losses), lower employment (and lower-level employment), and losses in productivity (that is, workers producing less than they are capable of producing due to absenteeism and what is known as “presenteeism”²⁵) by the victims of homelessness. These public losses do not include the suffering, both physical and emotional, of the homeless themselves and of their families.

2. General Health

The deleterious health effects of homelessness are obvious. They include such problems as exposure, violence, communicable diseases, malnutrition, substance abuse, and stress, the costs of which in both dollars and human suffering are overwhelming.²⁶ But even for those who are housed, poor quality housing—and standard housing that is overcrowded or that commands too high a percentage of a household’s income—can lead to extremely negative health outcomes that have both public and private consequences. Substandard housing results in higher risks of illness²⁷ and injury. These are often due to poor construction or deferred maintenance, and, on occasion, to the adaptations of one building component to

22. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *HOMELESSNESS IN AMERICA: FOCUS ON FAMILIES WITH CHILDREN 1* (2018), https://www.usich.gov/resources/uploads/asset_library/Homeslessness_in_America_Families_with_Children.pdf.

23. *Id.*

24. In an appearance on *The Daily Show*, HUD Secretary Shaun Donovan stated that “[t]he thing we finally figured out is that it’s actually, not only better for people, but cheaper to solve homelessness than it is to put a band-aid on it. . . . Because, at the end of the day, it costs, between shelters and emergency rooms and jails, it costs about \$40,000 a year for a homeless person to be on the streets.” See Molly Moorhead, *HUD Secretary Says a Homeless Person Costs Taxpayers \$40,000 a Year*, POLITIFACT (Mar. 12, 2012, 3:59 PM), <https://www.politifact.com/truth-o-meter/statements/2012/mar/12/shaun-donovan/hud-secretary-says-homeless-person-costs-taxpayers>. Philip Mangano, the policy chief of President George W. Bush’s homelessness program, indicated that “the cost of keeping people on the street added up to between \$35,000 and \$150,000 per person per year.” *Id.* See also Malcom Gladwell, *Million Dollar Murray*, NEW YORKER, Feb. 13, 2006, at 96, <https://www.newyorker.com/magazine/2006/02/13/million-dollar-murray> (providing a narrative presentation of part of one man’s life on the streets).

25. See discussion *infra* Part II.A.4.

26. NAT’L ACAD. OF SCI., ENG’G, AND MED., *PERMANENT SUPPORTIVE HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING CHRONIC HOMELESSNESS* 38–57 (2018); see also COMM. ON HEALTHCARE FOR HOMELESS PEOPLE, *HOMELESSNESS, HEALTH, AND HUMAN NEEDS* (1988).

27. DANNY FRIEDMAN, ECOTEC, *SOCIAL IMPACT OF POOR HOUSING* 14 (2010), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.476.9406&rep=rep1&type=pdf> (“The range of potential hazards include (among others), damp, mold, excess cold or heat, danger of fire, carbon monoxide, poor lighting, danger of falls, noise overcrowding and inadequate space, and structural integrity of the building. The type of risks to health stemming from these hazards include respiratory and asthmatic conditions, infections and other chest conditions, coronary disease and strokes, as well as fractures, burns, and a range of psychological and mental health conditions that can be exacerbated by poor conditions.”).

make up for the absence of another, such as using a stove, oven, or space heaters to heat an apartment when there is no other source of heating.

Even when housing meets code requirements for health and safety, it may create problems for low-income residents and for society. Many low-income residents are cost burdened, meaning that they pay more than thirty percent of their income for housing costs.²⁸ A significant number of low-income households pay more than fifty percent of their income for housing, which means they are “severely” cost burdened. Either condition leaves households with too little of their already limited income available for other household needs such as healthcare and medications, wellness activities, and nutrition.²⁹ Occasionally, the cost burden is the result of a household’s conscious choice to pay more in order to live in a better neighborhood with better housing, schools, and safety.³⁰ In other situations, there is no real choice and people seek the cheapest reasonably available alternative. In an attempt to limit the cost burden, some households double up, thereby sharing the housing costs.³¹ This causes overcrowding with its concomitant problems for the housing unit and for the doubled up households who are often still left with a cost burden, albeit a smaller one.³² The health-related concerns include greater risks of communicable illnesses, added stress, and emotional problems due to overcrowding, lack of privacy, and noise.

Finally, the absence of sufficient numbers of decent affordable housing units and the limited resources low-income households have to devote to housing costs creates what has been called “housing insecurity,” even among those who are housed.³³ A less obvious consequence of housing insecurity and the resulting frequent changes of housing accommodations is the less stable access to social services and health care.³⁴

28. AURAND ET AL., *supra* note 16, at 2 (“[71%] of ELI [extremely low income] renter households are severely cost-burdened, spending more than half of their incomes on rent and utilities. These 8.1 million severely cost-burdened households account for 72.6% of all severely cost-burdened renter households in the U.S. . . . [33%] of very low income (VLI) renter households; 8.2% of low income (LI) renter households, and 2.4% of middle income (MI) renter households are severely cost-burdened.”).

29. See NABIJAJ MAQBOOL ET AL., THE IMPACTS OF AFFORDABLE HOUSING ON HEALTH: A RESEARCH SUMMARY 2 (2015), <https://www.rupco.org/wp-content/uploads/pdfs/The-Impacts-of-Affordable-Housing-on-Health-CenterforHousingPolicy-Maqbool.etal.pdf> (“Families paying excessive amounts of their income for housing often have insufficient resources remaining for other essential needs, including food, medical insurance, and health care.”).

30. Sandra J. Newman, *Does Housing Matter for Poor Families? A Critical Summary of Research and Issues Still to Be Resolved*, 27 J. POL’Y ANALYSIS & MGMT. 895, 905 (2008).

31. Laryssa Mykita & Natasha Philkauskas, *Does Doubling Up Improve Family Well-Being?* U.S. CENSUS BUREAU (Mar. 31, 2016) <https://www.census.gov/newsroom/blogs/research-matters/2016/03/does-doubling-up-improve-family-well-being.html>.

32. *Id.*

33. See, e.g., Robynn Cox et al., *Measuring Population Estimates of Housing Insecurity in the United States: A Comprehensive Approach 1* (Dec. 19, 2017) (working paper series for the Washington Ctr. for Equitable Growth), <https://equitablegrowth.org/wp-content/uploads/2017/12/12192017-WP-measuring-housing-insecurity.pdf>.

34. MAQBOOL ET AL., *supra* note 29, at 5; see also, Diamond, *supra* note 2, at 1001–03.

3. Educational Losses

Inadequate and unaffordable housing has a negative impact on the educational achievement of children, both directly and indirectly.³⁵ The lost educational accomplishment affects the individuals concerned, their families, and society. Less education equates with lower employment levels and lower lifetime income.³⁶ This in turn results in lower tax revenue for every level of government and greater usage of public social services such as Medicaid, public assistance, and unemployment insurance. Lower educational attainment is also associated with more frequent interactions with the criminal justice and correctional systems.³⁷

4. Productivity Losses

Society suffers when employees are absent from work or, less visibly, when employees show up for work but cannot perform to their full potential. The latter situation is known as “presenteeism” and accounts for a significant loss in productivity.³⁸ While not all the productivity loss can be attributed to poor or unaffordable housing, much of it can.³⁹ Thus, the provision of decent affordable housing would likely correct some of the productivity loss due to both absenteeism and presenteeism.

B. Explaining the Housing Deficit

I have previously offered several possible explanations for the deficit of decent affordable housing units. The possibilities range from the obvious to the obscure.

35. See Diamond, *supra* note 2, at 1003–4.

36. See discussion *infra* Part III.B.1.c.

37. See *id.*

38. See, e.g., MAYO CLINIC HEALTH SOLUTIONS, THE TRUE COST OF POOR HEALTH 1 (2008), http://www.mywellbeingjourney.com/PDF/Marketing/Mayo-True_Cost_of_Poor_Health.pdf (“[M]any organizations currently don’t pay enough attention to the hidden costs of avoidable sick days and presenteeism – the cost of employees who are on the job but not fully functioning because of real illnesses and medical conditions, including asthma, seasonal allergies, arthritis, migraines, depression, back pain, gastrointestinal disorders and diabetes. . . . Depression costs U.S. employers more than \$35 billion a year in reduced performance at work. On-the-job pain (including back pain, headaches and arthritis) costs employers nearly \$47 billion a year in productivity loss. In one study, chronic conditions alone were estimated to cost The Dow Chemical Company more than \$100 million annually in lost productivity for its U.S. work force – the equivalent of 6.8 percent of total lab costs for the company in 2002. One research team calculated the total cost of presenteeism in the United States to be greater than \$150 billion per year.”); see also Bruce Japsen, *U.S. Workforce Illness Costs \$576B Annually from Sick Days to Workers Compensation*, FORBES (Sept. 12, 2012), <https://www.forbes.com/sites/brucejapsen/2012/09/12/u-s-workforce-illness-costs-576b-annually-from-sick-days-to-workers-compensation> (“The Integrated Benefits Institute, which represents major U.S. employers and business coalitions, says poor health costs the U.S. economy \$576 billion a year, according to new research. Of that amount, 39 percent, or \$227 billion is from ‘lost productivity’ from employee absenteeism due to illness or what researchers called ‘presenteeism,’ when employees report to work but illness keeps them from performing at their best.”).

39. MAQBOOL ET AL., *supra* note 29, at 8.

1. Misaligned Incentives

Among the obvious reasons for the deficit is that there is very little incentive for developers to produce affordable housing.⁴⁰ The profit potential for market-rate housing is far greater than for housing that is affordable to people below eighty percent of the area median income (AMI). By definition, low-income households have difficulty paying market rates in many of the nation's communities. Without government (or other) subsidies, developers and landlords would take on significant economic risk (not to mention opportunity costs) by providing affordable housing. However, if there are significant societal savings and benefits to be had through the provision of decent affordable housing, one might think the market ought to provide it.

2. Legal Barriers to Development

There are several legal barriers to the development of affordable housing that either make such housing impossible to build or increase to unmanageable levels the costs of building. Density, lot size, setback, and height restrictions are among the barriers that fit this model. There are also environmental regulations, impact fees, and permitting issues that increase costs and/or create delays in developing the property.⁴¹ Several commentators have noted the effect that regulatory issues have on the supply of affordable housing and on housing prices.⁴²

3. Political Barriers

There is a connection between the legal barriers to the creation of affordable housing and the political ones.⁴³ The latter fall into two broad categories: private resistance, often manifested through NIMBYism (the Not in my Backyard phenomenon); and public choice issues. NIMBYism is generally recognized as groups opposed to a particular development organizing and, through political action (legal or extra-legal in nature), making public their opposition to that development. That action might also take the form of demonstrations, lobbying, or finding or promoting candidates for public office who support the group's immediate or long-term view concerning development in their neighborhood.

The public choice theory, on the other hand, applies classical rational person economic analysis to decision-making by public officials. The theory posits that such officials place a high value on remaining in office and therefore make

40. Michael Diamond & J. Peter Byrne, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 530 (2007).

41. *Id.*; see also Diamond, *supra* note 2, at 989.

42. See Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply* (Nat'l Bureau of Econ. Research, Working Paper No. 20536, 2014), <https://www.nber.org/papers/w20536.pdf> (“[R]egulation appears to be the single most important influence on the supply of homes.”); see also Michael H. Schill, *Regulation and Housing Development: What We Know*, 8 *CITYSCAPE* 5, 8 (2005) (“[S]ome regulations may generate a surplus of benefits over costs, but the benefits will primarily inure to higher income families and the costs to low- and moderate-income families.”).

43. Diamond, *supra* note 2, at 991.

decisions calculated to achieve that result even if that decision conflicts with what they might prefer in their private capacity.⁴⁴ This leads them to vote as desired by contributors and those who are active and influential politically. That normally does not include low-income individuals and their advocates.

III. THE MAGNITUDE OF PUBLIC BENEFIT FROM PROVIDING AFFORDABLE HOUSING

There are estimates that the housing deficit for extremely low-income households in United States approaches eight million units.⁴⁵ The cost to develop anything approaching that number of units could be well over one trillion dollars.⁴⁶ In addition, the ongoing operations of those units would need to be subsidized. Today, the federal government spends approximately fifty billion dollars annually⁴⁷ on affordable housing and, of course, it would have to spend considerably more than that if significant numbers of new affordable units came online.

In order to determine whether the massive costs of producing and subsidizing such housing would be economically beneficial, one might, as government agencies must do prior to promulgating significant new regulations, perform a CBA.⁴⁸ While there is a robust academic and political debate concerning the appropriateness of performing a CBA in the face of human need, there are at least two strains of literature that attempt to address this issue.⁴⁹ The first looks at the problem of unquantifiable costs or benefits in the context of a CBA. The second addresses the rate of return on “social investment.”

While there is a body of costs and benefits that are large, observable, quantifiable, and monetizable, other benefits are much harder to quantify or to monetize. These include personhood benefits, such as self-esteem and a sense of well-being, the value of which are supposed to be included when preparing a CBA.

44. James Buchanan, one of the progenitors of public choice theory, has said:

Public choice theory has been the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do, notions that are surely more consistent with the political reality that we may all observe about us.

James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE-II*, at 11, 13 (James M. Buchanan et al. eds., 1984).

45. AURAND ET AL., *supra* note 16, at 2.

46. Olivia Barrow, *New Report Finds Reasonable Development Costs in Housing Credit Units Nationwide*, ENTERPRISE (Sept. 7, 2018), <https://www.enterprisecommunity.org/blog/2018/09/new-report-finds-reasonable-development-costs-in-housing-credit-units>.

47. CONG. BUDGET OFFICE, CBO-50782, *FEDERAL HOUSING ASSISTANCE FOR LOW-INCOME HOUSEHOLDS 1* (2015) (“In 2014, the federal government provided about \$50 billion in housing assistance specifically designated for low income households. . . . Since that time, such assistance has remained relatively stable at about \$50 billion annually.”).

48. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (amending and consolidating several Reagan-era orders).

49. See discussion *infra* Part III.A.

Through the remainder of this Part, I will discuss the problem of benefits that are hard to quantify or monetize. I will also catalog a magnitude of benefits to be derived from providing and subsidizing a sufficient number of affordable housing units.

Each social cost I discuss strongly correlates with inadequate or unaffordable housing. Yet there are factors other than housing that also correlate with the negative outcomes presented. Many of these other factors, such as poverty, lack of employment skills, and health, have a significant interaction with housing, making causality between any of these factors and the outcome difficult to establish.⁵⁰ Thus, the problematic issues of quantification and monetization.

In this Section, I will discuss two theories, Cost-Benefit Analysis (CBA) and Social Return on Investment (SROI), that purport to aid in efforts to quantify and monetize the costs and benefits of any action or decision. Each theory purports to do a more complete analysis of the costs and benefits of government providing for additional decent, affordable housing units. While I believe the two theories have significant flaws, I have adopted their use here because they have achieved favor with a segment of the economics and political establishment. I will offer a critique of these theories, particularly CBAs, but will utilize them to show that affordable housing would meet their economic requirements. My goal is to show that even using devices favored by economists and politicians, the production of significantly more affordable housing is warranted.

A. Quantifying the Unquantifiable, Monetization, and Social Return on Investment

The federal government has never provided the support necessary to close the gap between the number of decent and affordable housing units needed and the number of such units that exist. There are many theories as to why that support has been lacking, the most benign of which is that the realities of the economy and of government resources do not justify or permit the investment. While I do not in this Article address the wide array of theories that have been put forward on this point, I do wish to concentrate on a particular one—the economic and government resource argument.

1. Cost-Benefit Analysis

Ever since the first Executive Order, in 1981,⁵¹ requiring that CBAs be undertaken prior to major regulations, agencies and scholars have been aware of the problem of uncertainty in quantifying and monetizing costs and, particularly,

50. One's lack of means can lead not only to poor housing but also to poor health, poor educational opportunities, and a contraction of life experiences, including employment opportunities and performance. Moreover, health impacts educational achievement and vice versa. Both impact job possibilities which in turn impact health and education. I have chosen housing as the focal point of this analysis because it is physically central to everyday existence and is most responsive immediately to direct intervention.

51. Exec. Order No. 12,991, 3 C.F.R. § 127 (1981).

benefits.⁵² In fact, the Orders specifically empower the agencies to consider benefits that cannot be quantified such as dignity, fairness, and distributional affects.⁵³ This Article does not deal with issues related to the adoption of regulations. It deals instead with problems of adopting policy and, perhaps, legislation. But, as Cass Sunstein, a strong advocate for CBA, stated in an article dealing with the problem of difficult-to-quantify costs and benefits: “. . . it should be clear [throughout this article] that the implications are far broader [than simply regulatory policy]. In many areas of law and policy, it is important and perhaps even necessary to catalog both costs and benefits and to explore whether the benefits justify the costs.”⁵⁴

With this idea in mind, I want to adapt for the purpose of this discussion the same type of required Cost-Benefit Analysis for major regulatory proposals to the broader realm of government policy and budgetary action in relation to affordable housing.⁵⁵ In doing so, however, I will refer to and discuss some of the critiques of CBAs, particularly those concerning the problems of uncertainty and incommensurability.

Many commentators have addressed the problem of uncertainty in both the quantification and monetization of costs and benefits.⁵⁶ Sunstein recognizes that agencies are often presented with difficult-to-quantify-or-monetize costs or benefits. He points out that, often, they do not engage in such quantification. In this regard, Sunstein notes three types of problems associated with an agency’s effort to quantify or monetize any particular cost or benefit. The first, he says, is “epistemic,” a lack of knowledge about how to quantify and monetize the cost or benefit.⁵⁷ The second involves a quarrel with “standard economic thinking about monetization”—that the numbers derived from an analysis would not be an “appropriate basis for policy.”⁵⁸ The third relates to incommensurability; that is, that one attribute—human dignity, for example—cannot be made the equivalent of a sum of money.⁵⁹

52. The most recent Executive Orders are Exec. Order No. 13,771, 89 Fed. Reg. 9339 (Jan. 30, 2017) and Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

53. 76 Fed. Reg. at 3821 (“Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.”).

54. Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1372 (2014).

55. *Id.*

56. See, e.g., David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 340 (2006) (“Quantitative risk assessment has proven quite daunting, because data gaps make estimating the number of illnesses, deaths, and ecological disturbances a particular regulation will avoid impossible for most health effects and nearly all ecological effects. When agencies can estimate the magnitude of some health effects, that estimation usually requires a lot of guesswork in order to extrapolate estimates of a discrete regulation’s impact on human health from data that often comes from laboratory tests on other species or from human experience with much larger doses than those that the rules under consideration address.”).

57. Sunstein, *supra* note 54, at 1375.

58. *Id.* at 1375–76.

59. *Id.* at 1376.

Sunstein goes on to propose several ways for an agency to address these problems, all of which he compiles under a heading of “breakeven analysis.”⁶⁰ To summarize, Sunstein wants agencies to narrow, as much as possible, the space between the quantifiable and monetizable costs and the quantifiable and monetizable benefits.⁶¹ Then, concerning the resulting gap, he asks, “[h]ow high would the benefits have to be in order for the costs to be justified?”⁶²

Masur and Posner also recognize the uncertainties inherent in the conduct of CBAs by agencies.⁶³ They studied “all the major regulations issued by agencies from 2010 to 2013” and found “countless examples . . . where agencies fail to fully monetize the benefits and costs of regulations” even though, in most cases, they could have done so.⁶⁴ Since CBAs are intended as a “decision procedure that requires the decision-maker to estimate both the benefits and the costs of a regulation in monetary terms” they point out that when “a regulator chooses not to monetize all the benefits or all the costs, it is not doing a cost-benefit analysis.”⁶⁵ They then ask, “[i]f it is not doing cost-benefit analysis, what is it doing?”⁶⁶

They recognize two distinct problems in conducting a CBA. The first is one of causation: whether there is “empirical uncertainty as to whether the regulation will have the intended behavioral effects.”⁶⁷ The second problem involves monetization: “certain benefits are hard to monetize because no market exists in those benefits.”⁶⁸ Taking on the monetization problem, Masur and Posner propose a method for agencies to engage in Cost-Benefit Analysis when they don’t have a “reliable basis” for making a valuation.⁶⁹ That method involves regulators making (20 “reasonable guesses about the harms or benefits of regulations.”⁷⁰ These

60. *Id.* at 1385. Sunstein reprises the phrase “breakeven analysis” from OMB Circular A-4, which provides authoritative guidance on regulatory impact analysis, and states:

It will not always be possible to express in monetary units all of the important benefits and costs. When it is not, the most efficient alternative will not necessarily be the one with the largest quantified and monetized net-benefit estimate. In such cases, you should exercise professional judgment in determining how important the nonquantified benefits or costs may be in the context of the overall analysis. If the nonquantified benefits and costs are likely to be important, you should carry out a “threshold” analysis to evaluate their significance. Threshold or “break-even” analysis answers the question, “How small could the value of the nonquantified benefits be (or how large would the value of the nonquantified costs need to be) before the rule would yield zero net benefits?” In addition to threshold analysis you should indicate, where possible, which nonquantified effects are most important and why.

Id. (citing OFFICE OF MGMT. & BUDGET, CIRCULAR A-4, TO THE HEADS OF EXECUTIVE AGENCIES AND ESTABLISHMENTS REGULATORY ANALYSIS (2003))

61. *Id.* at 1385–89.

62. *Id.* at 1387.

63. Jonathan S. Masur & Eric A. Posner, *Unquantified Benefits and the Problem of Regulation Under Uncertainty*, 102 CORNELL L. REV. 87 (2016).

64. *Id.* at 92.

65. *Id.* at 89.

66. *Id.*

67. *Id.* at 95.

68. *Id.*

69. *Id.*

70. *Id.*

guesses would be based “on the experience and latent knowledge of the agency staff.”⁷¹

In elaborating on this proposal, Masur and Posner describe an Occupational Safety and Health Administration (OSHA)⁷² staff member who has worked at the agency for decades and has developed an “intuitive sense of when chemical substances are dangerous and when they are not.”⁷³ While the staff member may not be certain of her intuition, she believes it is correct. Masur and Posner call this a Bayesian “prior,” which they characterize as more than a “random guess” and as providing “useful information.”⁷⁴

They develop this idea by pointing out that there is a distinction between CBAs as a procedure and CBAs as a set of inputs.⁷⁵ Procedurally, CBAs direct agencies to “issue regulations if the benefits exceed the costs.”⁷⁶ As a set of inputs, CBAs are silent concerning the types of informational inputs the agency should use. Masur and Posner state that:

Regulators should use all relevant informational inputs when they conduct cost-benefit analyses . . . This means that the regulator’s prior should be used rather than disregarded. The process of repeatedly updating the prior in light of new information has a dynamic or Bayesian quality that distinguishes it from cost-benefit analysis as traditionally understood.⁷⁷

Of course, the agency must articulate and justify its prior so there can be critical evaluation of it.⁷⁸ The agency should quantify all the benefits it perceives in light of its articulated prior, even benefits thought difficult to quantify and monetize.

Amy Sinden reiterates the point that many CBAs fail to quantify or monetize important benefits stemming from regulation.⁷⁹ She analyzed forty-five CBAs conducted by the Environmental Protection Agency (EPA) and found that in thirty-six of them the “EPA described as ‘significant,’ or ‘substantial’ categories of benefits that the agency excluded as unquantifiable due to data limitations. Indeed, in certain instances, the monetized benefits estimate left out the value of ameliorating the very harm at which the rule itself was aimed.”⁸⁰ Such a failure raises significant questions about the value of CBAs. In short, to reprise Masur and Posner’s query, “[i]f it is not doing cost-benefit analysis, what is it doing?”⁸¹

71. *Id.*

72. OSHA is an agency of the U.S. government within the U.S. Department of Labor that is charged with ensuring the health and safety of workers while on the job. *See About OSHA*, U.S. DEP’T OF LAB., <https://www.osha.gov/aboutosha> (last visited Feb. 16, 2020).

73. Masur & Posner, *supra* note 63, at 119.

74. *Id.* at 119–20.

75. *Id.*

76. *Id.* at 121.

77. *Id.*

78. *Id.* at 125.

79. Amy Sinden, *The Problem of Unquantified Benefits*, 49 ENVTL. L. 73 (2019).

80. *Id.* at 79–80.

81. *See* Masur & Posner, *supra* note 62, at 89.

2. Social Return on Investment

In a similar vein, but with a very different focus, is the concept of Social Return on Investment (SROI).⁸² SROI purports to “measure the level of social value created by the activities of social enterprise.”⁸³ For this purpose, social investment is a capacious concept including investment for social good by the non-profit, public, benefit corporation, and even mission-driven for-profit sectors of the economy. There are more narrow definitions of social investment; Ryan and Lyne, for example, have defined a social enterprise as one which engages in business “with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners.”⁸⁴ For our purposes, however, the scope of the definition is relatively unimportant.

SROI analysis is very similar to CBA with a few major differences. The main one is that SROI is often applied to entities that do not have a profit motive or, in some instances, have a mixed profit and social motive. Entities such as government, non-profits, and, to a lesser extent, benefit corporations seek social gains as their goal, or, at least, as a significant goal of the enterprise. Thus, according to one group of commentators SROI is “‘a form of adjusted cost-benefit analysis that takes into account, in a more holistic way, the various types of impact’ that programs have From a technical point of view, we argue there is not much difference between classical cost-benefit analysis . . . and SROI.”⁸⁵

As such, SROI faces the same challenges in valuing intangible benefits as the CBA model. It is difficult to capture in monetary terms the increase in a beneficiary’s feeling of well-being or, as Arvidson et al. state, in the “improvement of personal utility (i.e. quality of life).”⁸⁶ Arvidson et al. also point out other problems with SROI analysis, such as causality and displacement issues.⁸⁷ Nevertheless, they note, much as I have, that “proponents suggest it is important to quantify [intangible values] despite these limitations as an economic value is able to have more influence over policy and commercial interests.”⁸⁸

Other bases that have been presented for pursuing additional affordable housing have failed to produce that housing. Perhaps an economic argument will get greater attention.

82. The concept of SROI was first developed in the late 1990s by the Roberts Enterprise Development Fund (REDF). SROI “measures enterprises’ social benefits to society through outcomes.” *Measurement and Evaluation*, REDF, <https://redf.org/the-impact/measurement-evaluation> (last visited Feb. 16, 2020). Since then, there has been a significant body of literature about SROI. See also, e.g., Dr. Malin Arvidson et al., *The Ambitions and Challenges of SROI 4* (Third Sector Research Ctr., Working Paper No. 49, 2010), http://bigpushforward.net/wp-content/uploads/2011/09/the_ambitions_and_challenges_of_sroi.pdf; Patrick W. Ryan & Issac Lyne, *Social Enterprise and the Measurement of Social Value: Methodological Issues with the Calculation and Application of the Social Return on Investment*, 2 EDUC., KNOWLEDGE & ECON. 223 (2008).

83. Ryan & Lyne, *supra* note 82, at 223.

84. *Id.* at 224.

85. Arvidson et al., *supra* note 82, at 4.

86. *Id.* at 11.

87. *Id.* at 13. Displacement refers to the beneficiary of a social investment benefiting at the expense of someone else who would have obtained the benefit and now does not.

88. *Id.* at 12.

B. Observable and Not-So-Observable Benefits of Decent Affordable Housing

For about forty years, there has been a federal requirement that, prior to proposing a “major” rule, all federal executive agencies (other than independent agencies), must prepare a CBA.⁸⁹ The analysis must lay out the costs and benefits of the proposed regulation and provide a justification for the regulatory scheme proposed.⁹⁰ In some cases, the costs and benefits are easily identifiable, quantifiable, and monetizable—that is, converted into a dollar equivalent. In others, the costs and, more typically, the benefits, either cannot be measured, or the measurable elements cannot be converted to monetary terms.⁹¹ I propose in this section to apply Cost-Benefit Analysis to the provision of affordable housing.

As I pointed out earlier, many costs to society can be attributed to the lack of decent affordable housing. Strong correlations have been found between poor or unaffordable housing and specific outcomes for low-income residents in areas such as health, education, criminal justice, employment, and productivity. Many of these costs could be avoided through the provision of decent affordable housing, although it is not clear exactly how much of the costs could thus be avoided. There are other costs, in areas such as human dignity and concepts of justice and equality, that also could be avoided by the provision of such housing. The avoidance of these costs are benefits to society and ought to be accounted for in any CBA. There are, however, problems in quantifying and monetizing some of these costs and problems in identifying causality between the absence of housing and the associated costs.

1. Hard to Measure Benefits

In this section I will point out some of the less readily visible, quantifiable, or monetizable benefits to society of providing affordable housing. Where possible, I will attempt to indicate an order of magnitude for the costs avoided or the benefits obtained.

a. Homelessness

The area with the most solid causal connections involves homelessness. Not only is the connection between an inadequate supply of affordable housing and homelessness readily apparent, but we can also quantify and monetize most of the harms associated with homelessness. These involve direct out-of-pocket costs to society and indirect costs such as educational deficits, employment and productivity losses, and damage to the lives of homeless people.⁹²

Programs such as Housing First⁹³ focus on getting homeless people into permanent housing without prerequisites such as sobriety, counseling, or securing

89. Exec. Order No. 12,991, 3 C.F.R. § 127 (1981).

90. *Id.*

91. See generally Sunstein, *supra* note 54; see also Masur & Posner, *supra* note 63.

92. See Diamond, *supra* note 2, at 996–1012.

93. See *Housing First*, NAT’L ALL. TO END HOMELESSNESS,

employment. They have proven quite successful in keeping formerly homeless individuals and families housed as well as in the reduction of their use of expensive social services.⁹⁴ The cost savings associated with this lower level of use have been substantial.⁹⁵ There has not been, however, a calculation of the value of an increase in dignity, self-esteem, or engagement with society to the formerly homeless individual or families. Similarly, there has not been a clear measurement of the benefits to local communities from greater access to public space due to the lower levels of homeless encampments, panhandling, or petty crime. Moreover, there has been little measurement of the possible increase in business activity in or the improved appearance and usage of downtown shopping districts that might result from housing large numbers of formerly homeless people who congregated in such districts.

As I mentioned, the causal connection between providing housing to the homeless and societal cost savings and benefits is clear, but it is not absolute. Among the imperfections in the causal claim is that not all homeless people will benefit from a Housing First (or similar) approach. Some will remain homeless, others will return to homelessness, and many will continue to utilize costly public services or have a negative impact on local communities. Nevertheless, significant direct cost savings can be observed (or can be projected based on more stable health and education) while other cost savings can be strongly intuited. Surely, for example, the gains in human dignity, self-esteem, and society's sense of equality and social justice will exist despite being hard to quantify or to monetize.

b. General Health

Similar difficulties are present concerning the effects of poor or unaffordable housing on the general health of residents. The overall governmental cost of health care in the United States is more than one trillion dollars per year.⁹⁶ Additional cost is attributed to charitable organizations and to hospitals which provide emergency care, often without reimbursement.⁹⁷ While not all public health care

<https://endhomelessness.org/resource/housing-first> (last visited Feb. 16, 2020).

94. See, e.g., Angela Ly & Eric Latimer, *Housing First Impact on Costs and Associated Cost Offsets: A Review of the Literature*, 60 CAN. J. PSYCHIATRY 475, 475–76, 482, 485–86 (2015) (“While our review casts doubt on whether [Housing First] programs can be expected to pay for themselves, the certainty of significant cost offsets, combined with their benefits for participants, means that they represent a more efficient allocation of resources than traditional services.”); see also Mary E. Larimer et al., *Health Care and Public Service Use and Costs Before and After Provision of Housing for Chronically Homeless Persons with Severe Alcohol Problems*, 301 J. AM. MED. ASS’N 1349, 1349 (2009) (“The provision of housing reduces hospital visits, admissions, and duration of hospital stays among homeless individuals, and overall public system spending is reduced by nearly as much as is spent on housing.”).

95. See Ly & Latimer, *supra* note 94.

96. Sara Kliff, *Health-Care Spending*, VOX (Apr. 30, 2014), <https://www.vox.com/2014/4/30/18077016/health-care-spending>.

97. See, e.g., Maureen Groppe, *Who Pays When Someone Without Insurance Shows Up in the ER?*, USA TODAY (July 3, 2017), <https://www.usatoday.com/story/news/politics/2017/07/03/who-pays-when-someone-without-insurance-shows-up-er/445756001>; Drew Calvert, *Who Bears the Cost of the Uninsured? Nonprofit Hospitals*, KELLOGGINSIGHT (June 22, 2015), <https://insight.kellogg.northwestern.edu/article/who-bears-the-cost-of-the-uninsured-nonprofit-hospitals>.

spending is attributable to housing problems, a significant portion of it is. According to researchers, “[a]s of January 2017, an estimated 553,742 people in the United States experience homelessness on a given night and in 2016, 30 million households in the United States reported having significant physical or health hazards within their homes.”⁹⁸ Concerning the importance of housing to health, one commentator has argued: “housing is a critical vaccine that can pave the way to long-term health and well-being.”⁹⁹

Consider the problems that may attend to those in inadequate units or cost burdened households. There may be insufficient funds for preventative care or for proper nutrition.¹⁰⁰ Similarly, children exposed to environmental hazards such as lead paint, mold, or allergens often exhibit developmental difficulties and chronic conditions that may plague them throughout their lives.¹⁰¹ Each of these issues can lead to educational deficits, which often presage employment and productivity deficits.

In addition to problems with the housing itself, the effects of housing insecurity, which describes the psychological effects on an individual of the loss of, or perceived threat of losing, his or her home add a significant cost. This situation has been referred to as “pre-homelessness.”¹⁰² The costs of housing insecurity may be the least visible of the health issues attributed to the lack of affordable housing and often involves a housing insecure resident making several moves within a short period of time.

The effects of housing insecurity manifest themselves in a variety of ways including high levels of stress and hyper-tension,¹⁰³ lack of stable access to continuous health and social service,¹⁰⁴ and loss of social networks and the corresponding social safety net.¹⁰⁵ Concerning the effect on children, Maqbool et al. found

Children without stable housing were more likely to use emergency department services as a result of a lack of a regular health care provider. Children under three years who had moved two or more times in the previous year were found to have lower weight for their age . . . and they were at greater risk of developmental problems. Among adolescents, a significant

98. Stephanie Diaz, *The Effects of Housing Insecurity on Health Outcomes and Costs*, HEALTHIFY BLOG (Mar. 1, 2018, 10:30 AM), <https://www.healthify.us/healthify-insights/the-effects-of-housing-instability-on-health-outcomes-and-costs>. Diaz goes on to report that almost thirty-three percent of emergency room visits are made by the homeless and that each visit costs up to \$3,700. *Id.*

99. Megan T. Sandel, *Housing Is a Critical Vaccine*, ENTERPRISE (Feb. 25, 2016), <https://www.enterprisecommunity.org/2016/02/housing-critical-vaccine>.

100. MAQBOOL ET AL., *supra* note 29, at 2.

101. *Id.* at 5.

102. See BROOKE SPELLMAN ET AL., COSTS ASSOCIATED WITH FIRST-TIME HOMELESSNESS FOR FAMILIES AND INDIVIDUALS A-14 (2010), https://www.huduser.gov/portal/publications/pdf/Costs_Homeless.pdf.

103. MAQBOOL ET AL., *supra* note 29, at 3–4.

104. *Id.* at 5.

105. *Id.* at 6.

association was found between early use of illicit drugs and moving four or more times before the age of sixteen years.¹⁰⁶

Some of the costs of these problems will be captured in the healthcare costs or in the losses attributed to employment or productivity deficits. Others will not and those losses are very difficult to quantify or monetize.

c. Education

As we have seen, there is a good deal of writing about the relationship between housing and education.¹⁰⁷ There is also robust literature concerning the cost to society of educational deficits and the benefits to be derived by society for students' achieving a higher educational level.¹⁰⁸ For example, Carroll and Erkut point out the "benefits to taxpayers from increases in students' educational attainment are very high" and "those benefits are entirely separate from the benefits that the students themselves gain through increased education."¹⁰⁹

Some of the benefits are easily recognizable and quantifiable. For example, increasing one's education is likely to increase one's earning capacity. Carroll and Erkut suggest that for each additional year of schooling one might expect on average a seven to ten percent increase in earnings.¹¹⁰ What is less immediately apparent is the benefit to the public through the increase in federal, state, and local taxes (including sales and property taxes) along with increased payments to Social Security and to Medicare.

While Carroll and Erkut point out there are demographic differences in the amount of increased expected income based on race and gender, they project a discounted present value (in 2002 dollars) of a lifetime increase in tax payments made by high school dropouts and by college graduates to be between \$128,000 and \$192,000.¹¹¹ Levin et al. made a similar calculation, but theirs is based on a lifetime earnings and tax differential, without reducing them to a present value figure.¹¹² Again, they point out demographic and gender differences, with the lifetime increased earnings ranging from approximately \$250,000 for white female

106. *Id.* at 3.

107. See MAYA BRENNAN ET AL., THE IMPACTS OF AFFORDABLE HOUSING ON EDUCATION: A RESEARCH SUMMARY 7 (2014), <https://www.nhc.org/wp-content/uploads/2017/03/The-Impacts-of-Affordable-Housing-on-Education-1.pdf>; Rebekah Coley et al., *Relations Between Housing Characteristics and the Well-Being of Low-Income Children and Adolescents*, 49 DEV. PSYCHOL. 1775, 1776, 1785 (2013). I have also written on this issue, see Diamond, *supra* note 2, at 1003.

108. See, e.g., STEPHEN J. CARROLL & EMRE ERKUT, THE BENEFITS TO TAXPAYERS FROM INCREASES IN STUDENTS' EDUCATIONAL ATTAINMENT (2009), https://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG686.pdf; see also HENRY LEVIN ET AL., THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN (2007), <https://academiccommons.columbia.edu/doi/10.7916/D8CF9QG9>; BYRON G. AUGUSTE ET AL., THE ECONOMIC COST OF THE US EDUCATION GAP (2009), <https://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap>.

109. CARROLL & ERKUT, *supra* note 108, at iii.

110. *Id.* at 15; see also LEVIN ET AL., *supra* note 108, at 7.

111. CARROLL & ERKUT, *supra* note 108, at 37–38.

112. LEVIN ET AL., *supra* note 108, at 7.

dropouts to approximately \$2,000,000 for white male college graduates.¹¹³ Similarly, the increased lifetime tax payments range from approximately \$80,000 for white female dropouts to approximately \$900,000 for white male college graduates.¹¹⁴

There are several other public cost savings that highly correlate with increased education. Since more highly educated people typically earn higher incomes, there is a reduced call for publicly supported social program funds. These include such items as public assistance and Supplemental Security Income, food stamps, housing subsidies, and Medicaid.¹¹⁵ Increased educational attainment is also correlated with decreased criminal activity. This is due to the lower need for criminal activity to support oneself as well as the higher opportunity costs for committing crimes. This should result in a downward movement of expenditures for police, courts, prisons and jails, as well as for the total costs of incarceration.¹¹⁶

Again, these assessments deal only with the reduction in public expenditures and do not count the private benefit of individuals feeling safer due to the reduction in crime or the self-esteem benefits to the employed person who need not resort to crime. There will, however, also be secondary benefits to society. For example, the higher incomes earned by those who increase their educational attainment will result in a multiplier effect.¹¹⁷ Some of the additional income will be spent to purchase goods and services. As these will be new inputs into the economy, these expenditures will provide new income to the vendors of those goods and services, who will, in turn, spend some of their increased income on additional employees, goods and services, and so on. Furthermore, the higher educational attainment of individuals will lead to more productivity for their employers and the same multiplier effect should apply. These are benefits that, despite the difficulty of quantifying and monetizing, need to be included in a more comprehensive CBA.

d. Productivity

I have discussed earlier the relationship between poor quality or unaffordable housing and health.¹¹⁸ When that relationship is superimposed onto the workplace, the effects are absenteeism, presenteeism, and other reductions in productivity. Presenteeism has been defined as “being present at work but unable to be fully engaged in the work environment. This condition leads to measurable loss of productivity due to physical, mental, and emotional health conditions or related to work, personal, social, and emotional life issues.”¹¹⁹ Presenteeism has an impact

113. *Id.* at 8.

114. *Id.*

115. *See id.* at 12 (estimating the present value of lifetime public health care savings by high school graduates over dropouts to average \$40,000); *see also id.* at 15 (estimating the savings of education on other welfare programs); CARROLL & ERKUT, *supra* note 107, at 19, 41–60.

116. LEVIN ET AL., *supra* note 107, at 13; *see also* CARROLL & ERKUT, *supra* note 107, at 21.

117. Akhilesh Ganti, *Multiplier Effect*, INVESTOPEDIA (Nov. 7, 2019), <https://www.investopedia.com/terms/m/multipliereffect.asp> (explaining the definition of “multiplier effect”).

118. *See* discussion *supra* Part I.A.2.

119. Diane M. Lack, *Presenteeism Revisited: A Comprehensive Review*, 59 WORKPLACE HEALTH & SAFETY J. 77, 77 (2011).

on “individuals and organizations—including effects on quality of life and health, increased health care costs, adverse effects for coworkers, increased occupational accidents related to distractibility, and deterioration of service and product quality.”¹²⁰

One group of commentators state that for the set of chronic conditions studied, “the costs associated with performance based work loss or ‘presenteeism’ greatly exceeded the combined costs of absenteeism and medical treatment combined.”¹²¹ They found the average annual health related costs at the major U.S. employer they studied were, in 2002 dollars, \$2,278 for medical care, \$661 due to absenteeism, and \$6,721 due to presenteeism.¹²² Lack has stated that the annual cost of presenteeism to the economy in the first decade of the twenty-first century was 180 billion dollars.¹²³

C. A Short Critique of CBAs

There is a body of literature that is critical of the CBA approach for reasons other than the technical one of not being able to quantify or monetize certain kinds of social benefits.¹²⁴ These critiques include objections to the position of most CBA advocates that CBA provides an “objective”¹²⁵ or “neutral”¹²⁶ analysis to reach efficient outcomes. One such critic, Lisa Heinzerling, wrote a reply to Cass Sunstein’s argument in favor of “breakeven analysis.”¹²⁷ In it, Heinzerling takes on Sunstein’s claim that breakeven analysis softens the harshness of a traditional CBA, but her critique goes beyond breakeven analysis to implicate problems with CBAs themselves. She states:

If breakeven analysis were, as Professor Sunstein suggests, a way “to avoid the risks that judgments will be based on anecdotes, intuitions, dogmas, impressions, or the power of self-interested private groups,” one would predict that agencies would deploy it across a full range of rules with costs or benefits that are difficult to quantify or monetize. If agencies do not do this, then one must

120. *Id.*

121. James J. Collins et al., *The Assessment of Chronic Health Conditions on Work Performance, Absence, and Total Economic Impact for Employers*, 47 J. OCCUPATIONAL AND ENVTL. MED. 547, 557 (2005).

122. *Id.* at 554.

123. Lack, *supra* note 119, at 80.

124. For an interesting breakdown of arguments both in favor of and opposed to Cost-Benefit Analysis, see Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998).

125. See, e.g., Daniel H. Cole, *Law, Politics, and Cost-Benefit Analysis*, 64 ALA. L. REV. 55, 59–61 (2012) (“In reality, CBA inevitably requires value judgments that are inherently subjective, rendering the analyses potentially manipulable for political ends.”).

126. See, e.g., Driesen, *supra* note 56, at 1; see also Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 389 (1981) (arguing “there is no ‘neutral’ or ‘correct’ way to solve this problem [the value of impacts on people], that the liberal procedure with respect to it has been inconsistent, and the recognition of value judgments involved in selecting a solution would deprive the efficiency calculus of some of its bogus air of objectivity”).

127. Lisa Heinzerling, *Quality Control: A Reply to Professor Sunstein*, 102 CALIF. L. REV. 1457, 1458 (2014).

ask whether breakeven analysis is being selectively deployed to rescue only those rules that are already deemed worthy on some basis other than cost-benefit analysis. If there is such deployment of breakeven analysis, then it is possible that the use of breakeven analysis itself may reflect “anecdotes, intuitions, dogmas, impressions, or the power of self-interested private groups.” That would be a problem for Professor Sunstein’s account of the utility of breakeven analysis.¹²⁸

The fact is, Cost-Benefit Analysis is just one of many ways that one might evaluate the efficacy of a proposal. Its proponents laud its objectivity, but fail to account for the normative choice that underlies it: that economic efficiency is the value that should be privileged rather than human life, environmental protection, or any number of other competing values.¹²⁹ As such, CBA is based on a series of subjective, often highly politicized, starting stimuli and carries no more value than any other subjectively based analysis.

Closely related to this problem is the problem of CBAs attempting to commodify non-market based social benefits. In relation to government programs, Ackerman and Heinzerling have pointed out that:

Cost-benefit analysis tries to mimic a basic function of markets by setting an economic standard for measuring the success of a government’s projects and programs. That is, cost-benefit analysis seeks to perform, for public policy, a calculation that happens routinely in the private sector. In evaluating a proposed new initiative, how do we know if it is worth doing? The answer is much simpler in business than in government.¹³⁰

The problem they identify leads to two significant concerns. The first is economic. Assuming that the intangible benefits of a program can be valued, how is that value determined? The second is moral. Is it appropriate to set a price on environmental preservation, the extinction of a species, or on human life or health? In the next sections, I will briefly address both questions.

1. The economic critique

In this section, I re-examine the monetization of difficult-to-monetize benefits. Here the critique will concern not the ability to monetize, but the method of monetization. I first want to address what Duncan Kennedy has called the “offer-asking problem.”¹³¹ I will then discuss the discount rate applied to benefits to be derived in the future in order to determine their present value.

128. *Id.* at 1459.

129. Cole, *supra* note 125, at 59.

130. Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553, 1556 (2002).

131. Kennedy, *supra* note 126 at 401.

a. The “offer-asking problem”

When there is a difficult-to-monetize problem, economists often solve it by asking two related questions. First, they might ask individuals what they would pay to obtain a particular benefit. Second, and alternatively, they might ask individuals what they would accept in order to give up the same entitlement. As Kennedy points out, the endowment effect often leads to the same person answering the two questions very differently.¹³²

A valuation based on such questions is also suspect because of the wealth effect. If a certain desirable benefit is not mandatorily available for the entire population, creating values for it based on what a person would pay to obtain it clearly favors those with greater resources. Kennedy proposes an example of the competition to obtain the use of a dialysis machine.¹³³ The wealthy can offer greater amounts for its use compared to the poor. Therefore, the allocation of such machines for the use of the wealthy would be efficient but would authorize the distributors of the machine “to disregard the actual suffering of many poor patients in favor of the actual money of a few rich ones.”¹³⁴ This concern will be revisited in the next section on the moral critique.

Ackerman and Heinzerling use a different example to illustrate a similar point. They discuss the problem of lead poisoning, which can cause serious developmental damage in children.¹³⁵ They cite an economist’s study extrapolating from what parents pay for a supposed treatment for lead poisoning to a dollar valuation for each IQ point loss. The study concluded that the then current standards that sought to protect children from lead hazards “may make little sense” and that “agencies should consider relaxing their lead standards.”¹³⁶ Because low-income families typically deal with the problem of lead contamination and since those families have limited resources to ameliorate the problem or treat its effects, using their expenditures to value the benefit of being free from the consequences of lead paint is unreliable. What they would pay if they had greater resources is left unexplored and, presumably, deemed irrelevant. It should be clear, however, that the pre-existing distribution of resources has a great effect on how value is determined. To quote Kennedy, “[i]t allows the liberal analyst to factor into the efficiency calculus disutilities of people who quite clearly have neither the property right nor the income to give those disutilities a ‘social’ weight.”¹³⁷

132. *Id.*

133. *Id.* at 407.

134. *Id.*

135. Ackerman & Heinzerling, *supra* note 130, at 1554 (explaining “[o]ne of the most serious and disturbing effects of lead contamination is the neurological damage it can cause in young children, including permanently diminished mental ability. Putting a dollar value on the (avoidable, environmentally caused) retardation of children is a daunting task but the economic analysts have not been deterred”).

136. *Id.* at 1555. The authors offer another example concerning the practices of mothers’ car seat fastening practices. The study examined the time difference between correctly fastening car seats and mothers’ actual practices. They valued the time difference by using the mothers’ actual or imputed wage rate, thus valuing the mothers’ valuation of the risks to their children by incorrectly fastening the seats. *Id.* at 1555–56.

137. Kennedy, *supra* note 126, at 407.

b. Discounting future benefits

For many social benefits, the political sequencing involves considering the making of a current investment with the goal of reaping benefits in the future. One can understand environmental regulation, for example, as a currently pertinent instance of this approach. When benefits (or costs, for that matter) are to be derived in the future, the monetary value of those benefits must be discounted to bring them into line with current costs; they must be reduced to *present value*. One must identify a time horizon for realizing expected benefits and then monetize them, before determining how much would one have to invest today in order to receive the benefit in the future. The discount rate is an interest rate that is used to determine how much must be invested at the discount rate to be worth the expected benefit at the time horizon. The higher the discount rate and the longer the time horizon, the smaller the amount of current investment needed.

Ackerman and Heinzerling provide a simple example. If you had \$100 to put into your savings account today and the bank offered three percent interest on savings, you would have \$103 in one year. In order to obtain \$100 in a year at a three percent discount rate, you would have to deposit only \$97.09 today.¹³⁸ The problem, of course, is that the benefits sought to be obtained might not have the monetary associations that savings and interest rates do. Moreover, given the absence of current investment in significant behavioral change, life on earth is likely to change dramatically for the worse or, perhaps, end due to environmental degradation. What is the appropriate discount rate to avoid that prognosis?

It is also important to recognize that the benefits from environmental regulation (or the provision of additional affordable housing) are not static. They continue indefinitely into the future and are, let us posit for this example, fundamental for societal wellbeing. By discounting the benefits, we risk that they do not exceed the costs, thus thrusting on future generations the harms that we could have avoided today. This problem seems not to be susceptible to a standard Cost-Benefit Analysis.

2. The moral critique

This section, which I have headed as “The moral critique,” is really about several different kinds of problems. At a very basic level, it is about the morality of reducing matters such as human life and suffering, species extinction, and environmental degradation to monetary terms. At another level, one might ask the question of how important equity is in our societal makeup. At yet another level is the question of how to prioritize incommensurable social goods. Each of these problems has an impact on the value of CBA.

For decades now, economists have utilized the value of a statistical life (VSL) to determine damages in tort actions and for plugging into CBAs.¹³⁹ Proponents

138. Ackerman & Heinzerling, *supra* note 130, at 1559.

139. Thomas J. Kniesner, W. Kip Viscusi & Christopher Woock, *The Value of a Statistical Life: Evidence from Panel Data*, 94 REV. ECON. & STAT. 74, 75 (2012).

have argued that such a calculation is necessary for efficient outcomes in regulatory governance and compensatory measurements.¹⁴⁰ Others have qualms about making such a calculation. In one example of such a qualm, Thomas McGarity quotes Professor Douglas McClean that “[t]o assign . . . exchange value to such benefits is to treat them as commodities when they should really have a different kind of value—a sacred value perhaps—and should be regarded as such.”¹⁴¹

McGarity goes on to question how members of society would react to a study that concluded the costs of treating handicapped infants with a birth weight of less than 900 grams exceeded a surviving child’s potential lifetime income as discounted to present value.¹⁴² Taking the example further, what is the value of treating terminally ill patients? Should we be looking at a CBA to make such decisions? Many in society might say we should not. Ackerman and Heinzerling point out that human life is not a commodity despite the implicit meaning embedded in the idea of the VSL.¹⁴³ They point out that one cannot buy the right to kill someone by giving that person the equivalent of the VSL, nor can the holder of a life sell it.¹⁴⁴ There is, for some, a repugnance to the commodification of human life.

On the question of equity, I have already argued that in a society in which people have widely disparate resources, an assessment of the value of a benefit based on what one would pay to obtain it is a poor proxy for the actual value of that benefit.¹⁴⁵ There are distributional starting points and distributional end points that make CBAs problematic. As a starting point, people with more resources can spend more to obtain desired benefits or to avoid undesired costs. The NIMBY phenomenon, discussed in Part II.B.3, *supra*, is an illustration of this distributional effect. Can it be said that the poor are less concerned with the placement of a toxic dump in their neighborhood than the wealthy? Surely not, yet because the wealthy have more money to spend to avoid such risks, dumps are disproportionately placed in poorer neighborhoods. That siting imposes additional harms on an already distressed segment of society. Looking again to Ackerman and Heinzerling concerning public policy choices:

There is an important difference between spending state tax revenues to improve the parks in rich communities and spending the same revenues to clean up pollution in poor communities. The value of these two initiatives, measured using cost-benefit analysis, might be the same in both cases, but this does not mean that the two policies are equally urgent or desirable.¹⁴⁶

140. *Id.* at 74–75; W. Kip Viscusi & Joseph E. Aldy, *The Value of a Statistical Life: A Critical Review of Market Estimates Throughout the World* (Nat’l Bureau of Econ. Research, Working Paper No. 9487, 2003).

141. McGarity, *supra* note 124, at 63.

142. *Id.*

143. Ackerman & Heinzerling, *supra* note 130, at 1564.

144. *Id.*

145. *See* discussion *supra* Part II.A.

146. Ackerman & Heinzerling, *supra* note 130, at 1574.

The question that society is being asked to resolve is how to choose between incommensurable options. CBA advocates argue, often strenuously, for an economic analysis.¹⁴⁷ Reduce all costs and benefits to monetary terms and there will be an objective and impartial answer. Of course, for the reasons already presented, this latter claim is incorrect. There are value judgments in privileging economic efficiency over other possible social goals. There are also value judgments in applying dollar amounts to intangible benefits and in making choices between options that have equal economic feasibility. The idea of political impact cannot be removed from what are, at least in our society, essentially political choices.

IV. AFFORDABLE HOUSING, CBA, AND THE CONFLICT OF COMPETING GOODS

In this part, I argue that affordable housing is one of the societal choices about which CBA should be a secondary (at best) concern. I will also point out why it is not. Despite the questionable value of using CBA for determining the efficacy of a policy promoting more affordable housing, I argue that doing so would meet CBA requirements. I then offer a financing mechanism that would support the effort.

A. Affordable Housing Should Be a Peremptory Goal of Society

Housing has a central role in our society. It is the hub of our existence and provides a basis for shelter, comfort, safety, and social life. It is a source of identity and of wealth. It is a significant factor in our health, well-being, and employment and educational activities.¹⁴⁸ Because of this centrality, decent affordable housing should be available to all members of society. But it is not. Tens of millions of people lack such housing and are either homeless, cost burdened, or live in substandard or over-crowded units.¹⁴⁹

The overall budget for the United States is approximately \$4.4 *trillion*.¹⁵⁰ To get an idea of how affordable housing fits into our national policy and budgetary priorities, the federal government spends approximately \$50 *billion* annually¹⁵¹ for affordable housing or just over one percent. This is in a nation that is at least eight million units short of what is needed to adequately and affordably house the nation's poorest residents.¹⁵² While this number of units could not, either physically or financially, be provided all at once, a phased-in process of whittling down the shortage surely could be undertaken.

147. See, e.g., CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018).

148. Diamond & Byrne, *supra* note 40, at 527.

149. AURAND ET AL., *supra* note 16, at 2. Aurand's estimated shortfall is for extremely low-income households, those below 30% of the Area Median Income (AMI). There is also a shortage of units for very low-income households (up to 50% of AMI); low-income households (80% of AMI); and workforce housing (120% of AMI). *Id.*

150. *Budget*, CONG. BUDGET OFF., <https://www.cbo.gov/topics/budget> (last visited Feb. 16, 2020).

151. CONG. BUDGET OFFICE, *supra* note 47.

152. AURAND ET AL., *supra* note 16, at 5.

Harken back to the example offered by Ackerman and Heinzerling about the dichotomy between providing for the improvement of parks in wealthier neighborhoods or the clean-up of environmental hazards in poorer ones.¹⁵³ In their example, CBA fails to resolve the problem of which to choose assuming only one could be chosen. Extrapolating from that hypothetical choice, society has made a series of actual choices that raise similar questions. These run a broad gamut from tax cuts to border walls, each choice reallocating governmental revenues away from certain governmental functions and towards others. These choices are political and in the most benevolent way they could be understood as the outcome of a conflict of competing goods. Less benevolently, they might be attributed to public choice, that is, to legislators voting in ways that are most likely to keep them in office.¹⁵⁴ Since contributions to campaigns and, to a great extent, voter turnout come predominantly from wealthier people and organizations, for most of whom affordable housing is generally not a priority (and some of whom actually oppose it),¹⁵⁵ one can see why there is a lack of urgency to solve this problem.

B. Affordable Housing Might Pay for Itself

While my fundamental position is that society has an obligation to provide decent affordable shelter for its low-income households, that position has had little traction with policy makers over the past half century. Because there is a lack of moral impetus and political will to provide more affordable housing, I have turned to a different kind of argument as to why society should provide it—CBA. The argument is that affordable housing could pay for itself through a combination of direct savings to government and benefits, both tangible and intangible, to private interests, some portion of which would be captured by the government through taxation.

I have already pointed out many of the areas of societal harms that could be, at least partially, addressed by more affordable housing.¹⁵⁶ I offered some idea of the magnitude of the social loss that is correlated with the absence of sufficient numbers of affordable housing units.¹⁵⁷ Some of the gains are measurable, like the benefits derived from better health and, to some extent, better education and through gains in employment and productivity. Others are not as easily measured, such as an increased sense of well-being, self-esteem, and confidence for newly-housed individuals.

While there is a strong correlation between the absence of decent affordable housing and losses in health, education, employment and productivity, and the increased costs associated with policing, criminal justice, incarceration, and sanitation, there is not a direct causative link between the absence of housing and these harms. But to take a page from Cass Sunstein's playbook, we might assign some percentage of these harms as being caused by the lack of enough affordable

153. Ackerman & Heinzerling, *supra* note 130, at 1574.

154. Diamond, *supra* note 2, at 1008.

155. See discussion *supra* Part II.B.3.

156. See discussion *supra* Part III.B.

157. See discussion *supra* Part III.B.

housing.¹⁵⁸ The eliminated costs and the social gains would recur annually and would increase as more affordable housing entered the market. Similarly, the resulting private gains would recur and grow as would the tax revenue as a result of such gains. The housing, as a durable asset, would remain indefinitely as an accretion to societal wealth.

C. Financing the Housing

The production of housing is both a time and capital-intensive undertaking. The size of the affordable housing deficit indicates that vast sums would be needed to close the gap. Even the federal government is unlikely to be able to finance the construction or renovation of the necessary units over a short time. Yet government need not carry the full burden of such a program. As of 2019 there is in excess of fifteen trillion dollars in mortgage debt outstanding in the United States.¹⁵⁹ The vast bulk of that financing comes from private sources rather than government. The private market, banks, insurance companies, real estate investment trusts, and other private institutions are capable of financing significant numbers of affordable units on an annual basis. What keeps them from doing so is the greater risk associated with financing affordable housing and the absence of incentivized developers to produce it. If the government incentivizes the lenders and developers, there is no economic reason why the housing should not be built.

Developers of housing, as do most other businesses, seek the highest returns relative to risk. In housing, the risks are higher and the returns are lower for affordable housing than for market rate housing. Therefore, most developers will not produce affordable housing.¹⁶⁰ As part of a response to that problem, Congress created the Section 8 Program.¹⁶¹ For the fiscal year 2020, the federal government has budgeted in excess of thirty billion for rent subsidies under the Housing Choice Voucher and the Section 8 programs.¹⁶² If this amount were increased significantly and made project-based (meaning the subsidy would remain with the project for a defined number of years and could be renewed), the economic disincentive of developers would be largely ameliorated.

Lenders could be incentivized to lend for affordable housing construction and renovation and for permanent mortgages by an expansion in size and scope of an already existing set of programs which guarantee to lenders the repayment of mortgage debt upon the default of mortgage borrowers. As of fiscal year 2017, the fund that supports the guarantees is about two percent of outstanding insured

158. Cass R. Sunstein, Nonquantifiable 9–12 (June 13, 2013) (unpublished manuscript) (available at <https://ssrn.com/abstract=2259279>)

159. BD. OF GOVERNORS OF THE FED. RESERVE SYS., MORTGAGE DEBT OUTSTANDING (2019), <https://www.federalreserve.gov/data/mortoutstand/current.htm> (last visited Feb. 16, 2020).

160. See discussion *supra* Part II.B.1.

161. This program was added to The National Housing Act of 1937 in 1974. See Housing Choice Voucher Program, Pub. L. No. 93–383, § 201(8), 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437f(2012)).

162. U.S. DEP'T OF HOUS. & URBAN DEV., FISCAL YEAR 2020 BUDGET IN BRIEF 6 (2020), <https://www.hud.gov/sites/dfiles/CFO/documents/HUD2020BudgetinBrief03072019Final.pdf>.

mortgages.¹⁶³ Therefore, between an expanded rent subsidy program and mortgage guaranty program, the government could leverage the benefits to be derived from the provision of more affordable housing to be built and operated by the private sector.

This is not to say that there are not problems other than economic ones that constrain the development of affordable housing. There still needs to be a social incentive to provide it and to prioritize such investments over other possible uses of resources. The economic argument has been used, often as a mask for other objections, to repel demands to produce more housing. What I have tried to do here is provide a mechanism to help reduce, as much as possible, the economic argument against producing housing.

V. CONCLUSION

Because there are many social goods that need to be achieved and finite and inadequate governmental resources available to achieve them, society is confronted with the conflict of competing goods. When there is not a principled system for choosing among those goods, choices are made by the exercise of power, sometimes subtly and sometimes not. The theory presented here is that the conflict might be avoided when there is a way to make achieving the good economically resource neutral—to make the benefits derived from providing it equal the costs of doing so. I hypothesize that would be the case with government support for producing more affordable housing.

163 . KATIE JONES, CONG. RESEARCH SERV., *FHA SINGLE-FAMILY MORTGAGE INSURANCE: FINANCIAL STATUS OF THE MUTUAL MORTGAGE INSURANCE FUND (MMI FUND)* 20 (2018).